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ABSTRACT

The status of professional employees at colleges and their role within the unionized workplace are considered in two articles. In "The Position of Professional Employees," Eliot Freidson discusses findings of a study on professionals and implications for college collective bargaining. Attention is directed to the validity of the position held by proletarianization theorists who claim that professionals are in much the same position as the industrial worker (i.e., without any significant power to control what they do, how to do it). The second article, "Professionals and the World of Work," by David M. Rabban, considers collective bargaining for professional employees. The influence of the 1980 decision of the U.S. Supreme Court in the National Labor Relations Board versus Yeshiva University is considered. The Court held that Yeshiva faculty were managers and were not covered by federal labor law. It is claimed that the Yeshiva decision has had minimal effects beyond private education. It is suggested that when collective bargaining conflicts with traditional professional values it is usually because of inappropriate transposition of legal doctrines developed in the industrial sector to the distinctive setting of professional employment. (SW)

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PROFESSIONAL EMPLOYEES AND COLLECTIVE BARGAINING

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Professional Employees and Collective Bargaining

Editor's Note: The issue of collective bargaining rights for professional employees, other than faculty, has long been a concern of the National Center. With the changing of our name in 1982 to include "the professions", we have addressed this issue at several conferences and related activities. Although the majority of our research is in higher education collective bargaining, we devoted one session at our Fifteenth Annual Conference to the professions. This issue of the Newsletter contains material prepared for and presented at that conference.

In order to understand the rights of professional employees to engage in collective bargaining, some background is necessary. Professional employees in the private sector have the right to bargain under the protection of the National Labor Relations Act (NLRA or the Act). The Act, however, recognizes the uniqueness of this group and prohibits mixed units of professional and nonprofessional employees unless the professionals vote otherwise. Aside from the separate unit requirement, professional employees enjoy similar rights and protections as those employed in any of the covered groups.

Professional employees are defined in the Act as follows:

> a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a). (Section 2(12) NLRA)

Public sector professional employees are covered by similar language in states with comprehensive collective bargaining enabling legislation.

Tension is evident between the rights given professional employees and the NLRA exemption from bargaining for supervisory employees. The distinction between supervisors and nonsupervisory professional employees has been difficult for the NLRB to resolve. Also, considering the managerial exclusion found in private sector bargaining one can argue that rights given to professional employees have been restricted by supervisory and managerial exclusions.

Supervisory and managerial exclusions are related to the traditional bureaucratic hierarchy and seek to overcome the dual loyalty problem. Supervisory authority must be distinguished from that encountered in industrial and manufacturing sectors and that of the exercise of expertise that arises from the use of professional judgment. It is in this area that the Board and courts have had difficulty.

At the Fifteenth Annual Conference, we asked a professor of sociology and a professor of law to look at the question of professional employees and their role within the unionized workplace. Eliot Freidson of New York University, the author of Professional Powers discussed the findings of his study on professionals and their world of work. David Rabban, Professor of Law at the University of Texas, addressed the various collective bargaining models that exist for professional employees.

Professor Freidson was unable to attend the conference, however, did submit his paper for publication. Professor Rabban's paper was presented at the conference.

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The Position of Professional Employees

Eliot Freidson
New York University

For some years, I have been trying to clarify the nature of professions and work out a systematic method of analyzing their work and their place in contemporary society. In Professional Powers,[1] I attempted to find a reasonable method of discriminating professionals from other workers in the labor force and of delineating the basic characteristics of the institutions that provide professionals with their special position in the political economy. Because the details of those institutions have important consequences for the position of professionals in society, and show important variation from one industrial nation to another, I restricted my analysis to the professions in the United States. However, I believe that my method of analysis—that is, the institutions I chose to analyze in detail and how I did so—is equally useful for other nations.

As the title, Professional Powers, literally asserts, I was concerned with appraising the powers of professions. The plural is deliberate for I do not assume a single mode of power but many. Professionals as individuals may have one kind of power while their professional associations may have another. Furthermore, professionals who are practitioners may have one kind of power and those who are administrators may have yet another.

In this paper, I have set forth the major findings of my study and then go on to discuss their implications for collective bargaining in higher education. In discussing those implications, I will emphasize the significance of recognizing what is distinct and valuable about professionalism and the desirability of adopting collective bargaining tactics and policies designed to preserve and strengthen it.

Professional Institutions

In my study of the professions, I found it useful to focus on the institutions that provide professions with the resources by which their members gain a living and that also provide them with the resources by which they can exercise power. I started with the legal and quasi-legal institutions that establish and protect jobs. The most obvious of those institutions is occupational licensing. It assures to individual members of a profession a legally enforced monopoly by giving them the exclusive right to perform a particular kind of work—for example, to cut into the human body. Occupational licensing is comparatively rare, however, and often does not provide a monopoly over work but rather over the use of a particular occupational title. On balance, it is not half as important as institutional licensing.

In the case of institutional licensing, an institution like a hospital or a university is chartered or licensed by the state. In the case of institutions providing professional services, however, the terms of the charter or operating license include requirements that specify the qualifications of some of the personnel they must employ, the organizational positions they must hold, and the standards that they must meet. In the United States, those standards are established primarily by private accrediting associations: the states accept their accrediting authority as a minimal requirement for charting or licensing. This is especially the case for the "professional personnel" of those institutions. The higher degrees that form the foundation for their qualifications are accepted if the training institutions that issued them are accredited by private, national, or regional accrediting bodies.

Detailed examination of the requirements for accreditation and state licensing revealed that the system sustains much more than the jobs of practitioners—those who do the basic tasks of doctoring, lawyering, teaching, and the like. Since by its nature the credential system is based on formal schooling, it cannot exist without professional schools and their faculties. The vast majority of professional school faculty members are not mere specialists, but qualified members of the profession even though they do not practice as much as they teach and do research. Neither law nor medical schools have a larger proportion of "lay" PH.D.'s on their faculties. Furthermore, in the organizations where professionals practice, some there do not practice but rather specialize in administration. Indeed, examination of licensing laws and laws governing professional corporations show that the system tends to require that key supervisory, managerial and sometimes executive positions be filled by certified members of the profession concerned.

Different members of professions thus play four distinct roles—administration, practice, teaching and research. Indeed, I argue that if their members were not to have the right to play all those roles, professions could not exercise significant control over their own affairs—their own training, their authority over their knowledge and skill, and their relative autonomy at work. Those in each role exercise different powers---the practitioner interpersonal and gatekeeper powers over clients, the administrator hierarchical power over clients and practitioners, and the teacher-researcher cognitive power over both students and practitioners, if not the public at large.

The Professional Employee

Since the vast majority of professionals are

employed, I devoted much attention to analysis of the professionals in organizations. What power can employed professionals wield in those organizations? In attempting to answer that question, I addressed the position of proletarianization theorists who claim that professionals are in much the same position as the industrial worker, which is to say, without any significant power to control what work they do, how to do it. I analyzed relevant segments of U. S. labor law to see how it defined the characteristics of professional employees. I noted that they are distinguished from ordinary employees by the leeway they have in choosing their work and performing it. Indeed, in labor law definitions of the various kinds of employees, routine use of discretion is a characteristic that professional employees share with supervisors and managers, but not with other workers.

The question, of course, is not mere definition but the reality it is intended to order. I found it useful to evaluate the issue of the powers of the professional employee by examining the decision of the United States Supreme Court in NLRB v. Yeshiva University where it was concluded that the faculty of Yeshiva University were managerial employees, albeit professionals. Like most rulings, the decision did not rely on a mechanical review of formal credentials, but rather on close examination of the work that people did and the decisions they made.

Confused as the Supreme Court was in a majority opinion that relied quite inappropriately on an industrial analogy, its consideration of what kinds of decisions the faculty made showed that they, as professionals, had sufficiently broad duties and prerogatives to make their status sufficiently ambiguous to be confused with that of management. That is a far cry from the position of blue- and white-collar workers in conventional employment circumstances. The special position of the professional employee revealed by that analysis raised serious questions about the intellectual value of considering professionals to be members of a deskilled proletariat that has no significant amount of control over its work. The question remains, however, to delineate the limits of that control.

Reviewing the available literature on the working conditions of the various employed professions, I attempted a systematic delineation of their various powers and weaknesses. All were found to have a fair amount of latitude in the performance of their work—what may be called technical autonomy. Those who serve clients have gatekeeping powers—the right to supply or withhold desired goods or services. They have, furthermore, interactional power over their clients, their very position in the organization and their professional standing sustaining that power. And while they do not often have the formal power to establish official organization policies, their discetionary decisions at work create the de facto policies of the organization, policies that may systematically subvert those intended by legislators or by those who are the official managers.

In discussing the Yeshiva decision and in subsequent discussion of the working conditions of professional employees, it was frequently necessary to address the nature of the relationship they had with those of their nominal professional colleagues who served in supervisory and managerial positions above them in the organizational hierarchy. I was led to conclude repeatedly that what distinguishes management from the professional rank and file is primarily the officially sanctioned power to allocate resources—salaries, of course, but more important for work, differential resources to the various units of the organization, resources of supporting staff, physical space, equipment, and the like.

There is where the rank-and-file professionals and those of their colleagues who play managerial roles may have profound differences. It is the managerial function to decide how to allocate available resources. Allocation, in turn, establishes the limits within which the professional worker must make decisions, and allows some kinds of work in a division of labor to be performed rather than others. This situation reflects important differences in power and interest between managers and practitioners. But it would be mistaken to consider them to be the same sort of difference that exists between management and industrial labor. In most organizations where professionals work, it is professionals who have the managerial power to allocate resources and supervise the rank and file, but they do not have the broader power that engineers and others have had in industry—to formulate the very work to be performed.

Other Agents and Powers

In reviewing available material on the power of professional associations---the characteristic corporate representative of professions in the United States—I concluded that they are relatively minor powers in Washington, though considerably more important in state capitols. More important is their role in implementing legislation in federal and state agencies. This is done, in part, through what might be called their proprietary agencies, agencies whose chief executive officer is ordinarily a member of one particular profession, with key staff positions reserved for members of the same profession as well. However, those individuals are often chosen on political grounds and so may not be committed to the policy positions of their professional associations. Furthermore, no professional association manages to present a monolithic viewpoint to legislatures, advisory committees, or the media: prominent individual members of every profession are able to gain a hearing and often adopt very influential positions that are at odds with the profession's official position.

Professionalism and Collective Bargaining

In the course of my discussion I, more than once, made reference to proletarianization theory,

and emphasized my rejection of its applicability to the professions in the United States today. This is not to say that proletarianization theorists are entirely wrong: indeed, there is enough truth to what they say that it may look as if I were engaged in a merely academic argument about whether the glass is half-full or half-empty. But this ignores the role of theory in setting the agenda for interpreting and responding to practical events. If the theory is too broad or crude to be sensitive to reality, its use in social action may lead to unfortunate results.

The underlying assumption of proletarianization theory is that all workers, professionals included, are involved in an inevitable historic process whereby they lose all control over their work and become helpless, unskilled employees exploited by managers in the interest of capital. Their only recourse is to join together as an entire class against the capitalist class in order to gain control over production. One peaceful means of doing this is to be found in the labor union movement, but in order for that movement to represent the entire working class, it must be industry-wide if not national in scope, and it must not be fragmented into special collective bargaining units. Proletarianization theorists, therefore, might urge that, for example, the faculty of a university be in the same bargaining unit as clerical, maintenance, and other workers because of their common class interests and because ultimate success in gaining control over work depends on common class action.

While it is unlikely that professional employees or, for that matter, those who are members of the crafts, could be persuaded to give up their special bargaining unit privilege in favor of such a long-term strategy dictated by a received theory of history, proletarianization theory also suggests specific tactics in collective bargaining. My guess is that it would encourage the restriction of bargaining to bread-and-butter issues, while avoiding issues of participation in policy-making or, as we say in academia, "faculty governance". Deprecating to the point of insignificance the autonomy of professionals by reducing it to be not much more than that of semi-skilled industrial workers, the conflict between labor and management becomes primarily economic in character. The determination, control and evaluation of the work to be done are accepted as management's "prerogative".

But it is precisely at least partial success in withholding that prerogative from management and in sustaining the cognitive authority to exercise it themselves that distinguish the professions from other forms of labor in the United States today. To my mind, it is the essence of professionalism, to be treasured and expanded rather than to be deprecated and cast away. This means that if professionalism is to guide the tactics of collective bargaining, the prime goal should be to win greater opportunity for professionals to choose and control their own work, and greater influence by practitioners on the allocation of the resources that limit the work they can do.

Professionals have only the power of their knowledge and skill, on the one hand, and of their public trust on the other. Claims for the former are sustained only by public trust, and trust is easily lost when material self-interest is emphasized. This means that if the professions in general, and college and university teachers in particular, emphasize salary and fringe benefits—bread-and-butter issues—over the integrity of their work and the welfare of their clients, they are unlikely to receive the public support they need for successful collective bargaining. Indeed, if there is a plausible way of considering professionalism to be antithetical to trade unionism, it is to define trade unionism as concerned only with bread-and-butter issues. To my mind, there is no necessary antithesis, however: even industrial trade unions are now involved in "participation" or "governance" to some degree. But that, not salaries, should be the central issue for professional unions today.

References

1. Eliot Freidson, Professional Powers: A Study of the Institutionalization of Formal Knowledge. Chicago: University of Chicago Press, 1986.

Announcing

NCSCBHEP

SIXTEENTH ANNUAL COLLECTIVE BARGAINING CONFERENCE

April 29 - May 1, 1988

Friday, Saturday, Sunday

Roosevelt Hotel, New York City

Professionals and the World of Work

David M. Rabban
University of Texas

Professionals in the Work Force

An increasing proportion of the American work, force is composed of professional and "semi-professional" employees working for organizations: teachers, college professors, nurses, librarians, social workers, scientists, engineers, journalists, performing artists, and, most recently, lawyers and doctors. Unionization and collective bargaining have become attractive to many of these professional employees. Although most professional employees have not formed unions, professional associations, in a number of fields, have transformed themselves into unions, new unions of professional employees have been formed, and established unions have expanded into the area of professional employment. It is impossible to obtain precise figures, but a recent study estimated that between 25% to 30% of professional employees are organized in labor unions, a higher proportion than the labor force as a whole. Some labor economists believe that unions of professional employees present the same opportunity for American unionism, which has recently suffered a decline of one-third in its representation of the work force, that the new industrial unions presented in the 1930s, at another low ebb of the union movement.

Recent discussion of collective bargaining by professional employees has understandably been dominated by the 1980 decision of the United States Supreme Court in NLRB v. Yeshiva University, (444 U.S. 672 (1980)). As you know, the Court held that the faculty at Yeshiva are managers and, therefore, are not covered by the National Labor Relations Act (NLRA). Prior unchallenged precedents, Justice Powell emphasized in his opinion for the five-person majority, had held that professional employees are ineligible to bargain under the NLRA if they also have supervisory or managerial responsibilities. Powell identified as the "controlling consideration" the fact that "the faculty at Yeshiva University exercise authority which, in any other context, unquestionably would be managerial." He cited the faculty's "absolute" authority in academic affairs. "To the extent the industrial analogy applies," he added, "the faculty determines, within each school, the product to be produced, the terms upon which it will be offered, and the customers who will be served." Justice Powell also pointed to the faculty's "predominant role" in faculty hiring, tenure, sabbaticals, termination, and promotion. Conceding that faculty members may act in their own interest, rather than in the interest of their employers, Powell claimed that this faculty independence only increases the danger of divided loyalty that the managerial exclusion is designed to prevent. There is no one "above" the faculty to check the pursuit of selfish union interests at the expense of desirable educational policies, and these policies form the heart of the university's "business". In Powell's opinion, the university's extraordinary reliance on the faculty's judgment in formulating academic policies makes the danger of divided loyalties particularly acute.

By defining faculty members as managers, the Yeshiva case constituted a major step beyond earlier decisions. Previously, the NLRB and the courts had declared only a few professionals in a work force outside the protection of the NLRA as a result of their supervisory or managerial status: for example, administrative accountants, plant construction engineers, head nurses, and academic department chairmen. In Yeshiva, by contrast, the Court, for the first time in the 45-year history of the NLRA, excluded from its coverage a large group of professional employees.

An NLRB decision in 1982[1] underlines the implications of the approach to collective bargaining by professional employees inaugurated in the Yeshiva case. The NLRB held that the faculty of a college of osteopathic medicine had become managers by obtaining additional responsibilities for academic matters through collective bargaining. The Board conceded that the faculty did not have managerial authority before it formed a union. But the Board also rejected the contention that a union should not be able to "bargain itself out of the protections of the Act". Rather, the NLRB assured the union that it would process a new representation petition "(i)f the College removes sufficient authority from its faculty members so that they revert to the status of nonmanagerial employees." This analysis places professional employees in an unenviable "Catch-22": To the extent that they use collective bargaining to obtain meaningful authority that many would consider fundamental to professional employment, they lose the protection of federal labor law.

Union organization of college professors at private institutions has declined precipitously in the wake of Yeshiva, and the NLRB has decertified many existing unions after findings that faculties possess managerial authority. The NLRB has also extended the reasoning of Yeshiva to other professions. In 1985, it excluded as managers the physicians and dentists of a health maintenance organization, citing their participation on various committees that establish medical policy and engage in peer review. Many predict that additional categories of professional employees will ultimately fall under the managerial and supervisory exclusions. And some commentators, including Stephen Schlossberg, the Deputy Under Secretary of the United States Department of Labor, fear that the reasoning of

Yeshiva may even be extended to exclude from the Act's coverage workers involved in recent and often praised experiments in worker participation in decisionmaking in the industrial sector. Within the last two months, moreover, the Supreme Court's interpretation of federal labor law governing private employment has spilled over to the public sector. A hearing examiner for the Pennsylvania Labor Relations Board, relying heavily on Justice Powell's opinion in Yeshiva, held that the faculty of the University of Pittsburgh, a state institution, are managers ineligible to bargain under the state labor law covering public employees.[2]

Consequences of Yeshiva

Despite these significant developments, the actual consequences of the Yeshiva decision should not be exaggerated. Even within private colleges and universities, the area of its most immediate impact, the Yeshiva decision has not ended collective bargaining by faculty unions. As the "'Yeshivawatch' Disposition List" produced by the National Center indicates, the NLRB has found, in at least 18 cases since Yeshiva, that faculties are not managerial. Many collective bargaining relationships established before the Yeshiva decision between faculty unions and private colleges and universities remain viable. Post-Yeshiva NLRB and circuit court decisions lack coherence and cannot be reconciled with each other. Although some declare that extremely weak faculties are managerial, others find that faculties are not managerial even though they are at least as powerful as Yeshiva's.

The consequences of the Yeshiva decision beyond the private higher education thus far has been minimal. Only one NLRB decision has excluded physicians and dentists as managers. Unions of physicians and dentists, moreover, continue to organize and expand in both the private and the public sectors. The recent decision by the Pennsylvania Labor Relations Board is an exception to the general post-Yeshiva trend in public higher education. Many states, through their legislatures and labor boards, have explicitly included faculty members within the coverage of their public sector labor laws. Some of these states, such as Illinois and Ohio, have done so since the Supreme Court's decision in Yeshiva. In addition, throughout the post-Yeshiva period, the NLRB has consistently rejected claims that other groups of professional employees, previously included under the protection of the NLRA, should now be excluded as managers in light of Yeshiva. The NLRB continues to treat nurses, engineers, scientists, lawyers, and other professionals as employees covered by the NLRA. Particularly as an increasing proportion of the NLRB and the federal courts consists of people appointed by President Reagan, the possibility exists of extending the rationale of the Yeshiva decision to other professions, and even to workers who are part of innovative participation plans in the industrial sector. But, it seems to me as least as likely that this rationale will be confined primarily to faculty. After all, college professors, even at institutions with relatively weak systems of faculty governance, have a greater role in formulating organizational policies than do most other professionals and virtually all nonprofessional employees.

Approaches to Collective Bargaining by Professional Employees

The continuation—in fact, the expansion—of collective bargaining by professional employees since the Yeshiva decision provides a good reason to reevaluate, on the basis of actual experience, long-standing arguments about the relationship of collective bargaining to professionalism. Such a reevaluation, in my view, suggests modifications of traditional interpretations of labor law in the distinctive context of professional employment.

The reaction to collective bargaining by professional employees seems to fit into three categories. Many professionals consider autonomy from hierarchical control, collegial participation in organizational decisionmaking, and rewards based on individual merit inherent in the very definition of professional employment. A large proportion of professional employees, indeed, probably a substantial majority, believe that any collective bargaining, because of its very different underlying assumptions, inevitably destroys the distinctive qualities of professional work. Collective bargaining may be appropriate for industrial or clerical workers, but it is inconsistent with professional status.

Increasingly, however, professional employees have viewed collective bargaining as a legally enforceable method to preserve or obtain the same prerogatives of professional status that their skeptical colleagues perceive unions to threaten. When organizations refuse the autonomy necessary to the effective performance of professional work or make decisions on fundamental issues of personnel and policy without considering the perspectives of their professional employees, legally enforceable provisions in a collective bargaining agreement that would guarantee professional autonomy and participation seem very attractive. Collective bargaining by professional employees, many proponents add, need not mimic the experience of the industrial sector in every respect. Indeed, they emphasize the responsibility of professional employees to develop, through their unions, new forms of collective bargaining appropriate to the distinctive backgrounds, roles, abilities, and interests of professionals.

A third approach, which is least popular and is becoming even less so, also advocates collective bargaining by professional employees, but seeks to emulate the traditional industrial model. Supporters of this approach claim that those who want to use collective bargaining as a legal support for professional norms, like those who oppose any form of collective bargaining by professional employees, share a pathetically romantic view of professionalism that has been rendered obsolete in post-industrial society. The professional employees who most need

collective bargaining are those who have never had, or who have lost and cannot hope to regain, the idealized image of professional status. Unions of professional employees should adopt the tough adversarial stance of traditional industrial unions, whose members professional employees increasingly resemble. They should challenge decisions that injure employees rather than engage in misguided attempts to use the ideology of professionalism to obtain influence in what are inevitably managerial functions. For example, members of a faculty union should not participate in tenure decisions, but should challenge, through grievance and arbitration, decisions by administrators that deny tenure to professors represented by the union.

Because most professional employees, whether they oppose or favor collective bargaining, share a commitment both to the desirability and to the viability of traditional professional values, it is useful to review the extent to which collective bargaining has promoted or impeded these values. From this perspective, the actual experience of collective bargaining by professional employees has been decidedly mixed. On the positive side, many collective bargaining agreements have supported professional values, often by incorporating codes of professional standards promulgated by groups such as the American Nurses Association and the American Association of University Professors. Judicial enforcement of collective bargaining agreements have invalidated attempts by college administrators to abolish tenure and to make decisions about academic issues without consulting the faculty. Grievances brought under the "professional issues" clause of the collective bargaining agreement of a doctors' union and the State of California have forced recalcitrant prison administrators to give physicians adequate office space near their patients. Collective bargaining agreements provide musicians in symphony orchestras and lawyers in legal services programs with a right to vote on hiring fellow professionals. Through collective bargaining, nurses have obtained protection against being assigned to nonprofessional duties (such as housekeeping) or to professional duties for which they are insufficiently trained (such as ICUs). Engineers and scientists in corporations have won rights to publish research papers on non-confidential topics and to attend professional meetings on company time. Journalists can remove their by-lines when they believe that editors have altered their articles beyond recognition, and writers for television and movies have contractual rights of access to directors during production. Just as librarians have achieved formal rights to participate in book selection, social workers have negotiated a role in formulating agency policy. These examples of support of professional values through collective bargaining can easily be multiplied. Moreover, self-interest and professional interests often overlap. Collective bargaining agreements that limit class size and case loads make life easier for teachers and legal services attorneys, but they also promote a higher quality of teaching and legal representation.

On the other hand, some aspects of collective bargaining by professional employees validate the worst fears of those who oppose unionization as a threat to professional values. Lawyers who have worked in or represented legal services organizations and a radical sociologist who has studied them agree that collective bargaining has produced more adversarial relationships between staff attorneys and managers, which have impaired cooperation on professional issues. A teachers' union effectively prevented a nonunion teacher from commenting on a proposed collective bargaining agreement at a public meeting of the school board until the Supreme Court, on first amendment grounds, overruled the prior decisions of the state labor board and courts.[3] A union of community college teachers negotiated a collective bargaining agreement that essentially limited faculty participation in governance to union members. The Supreme Court upheld this result, despite lower court rulings that it violated the first amendment.[4] While acknowledging that "there is a strong, if not universal or uniform, tradition of faculty participation in school governance," the majority opinion emphasized that there is no "constitutional right of faculty to participate in policymaking in academic institutions".

Professional Values and Collective Bargaining

In my opinion, many of the results of collective bargaining that are inconsistent with traditional professional values can be traced to the inappropriate transposition of legal doctrines developed in the industrial sector to the distinctive setting of professional employment. Unfortunately, this transposition often deters a professional model of collective bargaining and encourages an industrial one. For example, the facts of the two Supreme Court cases I just mentioned reflect the operation of the doctrine of exclusive representation. This doctrine gives a union that has won an election in an appropriate unit of employees the exclusive right to bargain on behalf of everyone in the unit, including the employees who have not joined the union. In many circumstances, it is an unfair labor practice for an employer to discuss with individual employees matters in which the union has a legitimate interest. Yet most professionals, whether or not they are members of a union, believe that their training and expertise entitle them to present their individual views on matters related to their employment. Similarly, the distinction between mandatory and permissive subjects of bargaining, by allowing the refusal of an employer even to discuss issues of policy that are typically and understandably of enormous concern to professional employees, deters the development of a professional model.

The Supreme Court's decision in Yeshiva provides what may be the most striking example of the unfortunate application of the industrial model to professional employment. The majority and dissenting justices in Yeshiva, while vigorously disagreeing about virtually every significant issue in the case, all recognized the imperfect fit between the NLRA, a statute designed for the hierarchical and bureaucratic structure of the industrial workplace,

and the very different relations typical of colleges and universities. Yet the majority opinion, drawing upon the distinction between employees and managers that arose in industry, seemed to assume that people who exercise substantial influence in the organizations that employ them should not be able to engage in collective bargaining protected by law. The Yeshiva decision places in an uncomfortable position professionals attracted to collective bargaining as a means to obtain or support professional values. The decision may force them to choose between no collective bargaining and an industrial model. Many who would want a professional model of collective bargaining might, as a second best alternative, prefer an industrial model to no collective bargaining at all. The Yeshiva decision may thereby foster the industrialization of professional work, that paradoxically, it was apparently designed to prevent.

A Professional Model of Collective Bargaining

More creative adaptations of traditional principles of labor law to professional employment could foster a professional model of collective bargaining. Modifications of the principle of exclusive representation could accommodate the desire of most professionals, whether or not they are in unions, to deal directly with their employers on professional matters. Requiring bargaining over all but illegal subjects would allow unions to negotiate more effectively over issues of professional concern. Furthermore, the scholarly differentiation between bureaucratic and professional responsibilities would provide an excellent legal distinction under the NLRA between covered professional employees and excluded managers and supervisors. Such a distinction would respect the key concern about divided loyalties that underlies these exclusions while allowing professionals who do not have financial and other bureaucratic obligations to the organization the right to use collective bargaining as a vehicle for meaningful participation in the development of organizational policies related to their professional expertise.

My suggestion that alternative legal rules should be developed to promote forms of collective bargaining more compatible with the legitimate goals of professional employees is not as dramatic or novel as it may first appear. The provision in the Taft-Hartley Amendments allowing professional employees to form their own unit reflects the recognition by Congress of the unique nature of professional work. The legislative history of these amendments reveals the assumption that the collective bargaining agreements negotiated by units composed exclusively of professional employees would contain many provisions designed to accommodate the distinctive interest of professionals. Subsequent experience suggests that the creation of separate units of professionals may be insufficient and that additional modifications of labor law may be necessary.

The adaptation of labor law developed in the private sector to the special characteristics of public employment during the past two decades suggests that a similar process might work for professional employment. And perhaps a new model of collective bargaining for professionals might apply to other workers as well at a time when many employers and unions in the industrial sector believe that more autonomy and influence at work will increase both job satisfaction and productivity.

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Editor and Director of the Center: Joel M. Douglas
Executive Assistant to the Director: Beth Hillman
Administrative Assistant: Ruby N. Hill
Research Assistants: Faryda Krane
Stephen Bryan

Address all inquiries and contributions to the National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, 17 Lexington Avenue, Box 322, New York, N.Y. 10010. Telephone: (212) 725-3390.